STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2008
v	No. 274832 Midland Circuit Court
DEVIN DEMAR DINKINS, Defendant-Appellant.	LC No. 06-002761-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration). Defendant was sentenced to 2-1/2 to 15 years' imprisonment. Because there was no prosecutorial misconduct, the trial court did not give an erroneous jury instruction, and the offense variables were correctly scored, we affirm.

Defendant was convicted of penetrating the victim's vagina with a finger. Defendant was acquainted with the victim's cousin. He stopped at the cousin's house on April 6, 2006, while the victim was babysitting her cousin's children. One child had gone to school, leaving the victim alone with her cousin's son. The victim testified that she let defendant into the house to look for some sunglasses that he claimed might be there from an earlier visit. While inside the house, defendant dragged the victim into a bedroom and pushed her onto the bed. The victim repeatedly told defendant to stop as he kissed her neck, felt her breasts, and rubbed her body. The victim testified that defendant pulled down his pants. He could not "get in" because she held up her pants, but he put his hand inside her pants and inserted a finger into her vagina. He stopped when the child entered the bedroom. The victim ran with the child to the living room. Defendant sat on the couch with her, where he again succeeded in placing his hand into her pants. After defendant left the house, the victim told a friend and her mother about how she was "almost raped." Defendant conceded at trial that there was some touching activity with the victim, but testified that it was consensual and that he did not insert his finger into her vagina.

On appeal, defendant argues that the prosecutor engaged in misconduct by using the word "rape" during jury voir dire, and again in his opening statement and closing argument. Defendant argues that the use of the word "rape" was misleading and prejudicial because he was not accused of penile penetration.

Because defendant did not object to the prosecutor's use of the word "rape," defendant must establish a plain error affecting his substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). If these requirements are satisfied, this Court must exercise discretion in deciding whether to reverse. *Carines, supra* at 763. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003).

The test for prosecutorial conduct is whether the defendant was deprived of a fair and impartial trial. *People v Dobek,* 274 Mich App 58, 63; 732 NW2d 546 (2007). When reviewing a claim of prosecutorial misconduct, we must examine the prosecutor's remarks in context. *Callon, supra* at 330. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schutte, supra* at 721. A prosecutor may not argue facts not in evidence or mischaracterize evidence, but is free to argue reasonable inferences from the evidence. *People v Watson,* 245 Mich App 572, 588; 629 NW2d 411 (2001).

In a technical sense, we agree with defendant's argument that the prosecutor mischaracterized the alleged conduct in this case. In 1974, common-law rape was codified and expanded into varying degrees of "criminal sexual conduct." 1974 PA 266; MCL 750.520a *et seq.*; *People v Heflin,* 434 Mich 482, 511-512; 456 NW2d 10 (1990). "[T]he Legislature replaced a variety of obsolescent statutory provisions relating to sexually assaultive crimes with a unified statute more reflective of contemporary understanding of the nature of criminal sexual conduct and the interests of modern society." *People v Johnson,* 406 Mich 320, 327; 279 NW2d 534 (1979).

Examined in context, however, it is apparent that the prosecutor used the term "rape" in a colloquial sense, which considered the victim's own perception of the term in her testimony. The trial court informed the prospective jurors before the "rape" term was used at trial that the charged offense required "sexual penetration, to-wit: finger in the vagina," that it must cause personal injury and be accomplished by force or coercion, and that it was "known as criminal sexual conduct in the first degree." The term "rape" was first used by a prospective juror when responding to the trial court's inquiry into the jurors' experiences with sexual violence or sexual abuse. The prosecutor later inquired whether the prospective jurors believed that medical evidence is needed or whether a victim must fight back or resist in a "rape case." The prosecutor identified the nature of the case in opening statement as involving a "stranger at the door who rapes the babysitter," but went on to state, "[t]he elements in this case of the charge are that the Defendant penetrated [the victim] with his finger in her vagina, however slightly." Finally, after the victim testified that she told her friend that she was "almost raped," the prosecutor inquired into her understanding of this phrase and how it related to the charged act:

Q. You used that term, almost raped. What did you mean by that?

A. He's trying to pressure me into having sex with him, but he didn't, so.

Q. But he stuck his finger in you?

A. Yeah.

The prosecutor's closing argument in response to this testimony, that the victim used the phrase "almost rape" to describe how defendant tried to have intercourse with her, was reasonable. Examined in context, the prosecutor did not mislead the jury to believe that defendant was charged with penile penetration, but rather continued to argue that the act of "rape" underlying both the original charge of first-degree criminal sexual conduct and the lesser charge of third-degree criminal sexual conduct was defendant's forcible insertion of his finger into the victim's vagina. We note that defense counsel also used the term "rape" in his closing argument when attacking the credibility of the victim's testimony that defendant told her to call him if she broke up with her boyfriend and wanted something new before he left the house. Defense counsel argued, in part, "[d]oes that jive with common sense? You've just raped someone, using the terms today, and yet you say give me a call."

We are satisfied from the record that a timely objection by defense counsel could have cured any technical error in referring to the act of forcible digital penetration as "rape." Absent an objection, the trial court's instruction to the jury that it must decide the case based only on the evidence and its instructions of the law was sufficient to cure any prejudice. Because defendant has failed to demonstrate an outcome-determinative plain error, reversal on this ground is not warranted. *Schutte, supra* at 720-722.

We also reject defendant's unpreserved challenge to the prosecutor's direct examination of the victim regarding defendant's conduct after she ran from the bedroom to the living room. The prosecutor asked the victim:

> *Q*. What happened next?
>
> *A*. He sat at the end of the couch, and he started trying to go back into my pants. He did succeed on getting in my pants again after I told him, no, he needs to stop.
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> * * *
>
> *Q*. After he stuck his finger in you the second time when you were on the couch and he got off of you, what did he do; [sic] and he said, the, you know, if your boyfriend and you break up, give him a call or whatever?
>
> *A*. He left.

Even if the prosecutor mischaracterized the victim's testimony that defendant "did succeed on getting in my pants again," reversal is not warranted because defendant has failed to establish the necessary prejudice. The trial court instructed the jury that "[t]he lawyers' questions to witnesses are also not evidence, and you should consider those questions only as they give meaning to the witness's answers." This instruction was designed to address the type of situation presented here and was sufficient to dispel any prejudice. *Schutte*, *supra* at 721-722.

Next, defendant argues that the trial court gave an erroneous deadlocked jury instruction. Because defendant did not object to the instruction at trial, we review this issue under the plain

error doctrine in *Carines, supra* at 763. In general, "[j]ury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Dobek, supra* at 82.

In *People v Sullivan,* 392 Mich 324, 342; 220 NW2d 441 (1974), our Supreme Court adopted the American Bar Association's standard jury instruction 5.4 as the appropriate instruction to give to a deadlocked jury, and stated that "[a]ny substantial departure therefrom shall be grounds for reversible error." The ABA instruction was subsequently incorporated in CJI2d 3.12. *People v Pollick,* 448 Mich 376, 382 n 12; 531 NW2d 159 (1995). The departure standard was further defined in *People v Hardin,* 421 Mich 296, 314; 365 NW2d 101 (1984), to include a situation where there is "an undue tendency of coercion—e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement?" Whether the trial court's instruction required, or threatened to require, the jury to deliberate for an unreasonable length of time, or for unreasonable intervals, are also relevant considerations. *Id.* at 316.

Here, on the first day of deliberations, the jury was excused for deliberations at 10:48 a.m. and reported its difficulty in reaching a verdict at 3:48 p.m. Defendant concedes that the trial court thereafter gave a jury instruction that, for the most part, mirrored CJI2d 3.12. Defendant's sole claim is that the trial court erred by subsequently remarking, when conversing with jurors regarding whether an adjournment would be helpful:

> I am not – this is not indentured servitude, folks. You're not going to be in there forever, and I don't want you to think that. But I do suggest this to you. And in my experience, you know, you can get – you can get fairly tightly bound here. And I'm thinking that an evening off and coming back tomorrow might be helpful on this. Go home. Put this aside. Be with your families, friends. Watch television. If you're so inclined, have a drink, whatever it may be to relax and enjoy the evening and come back tomorrow morning.

The trial court thereafter ordered an adjournment after acknowledging to the jury, "[y]ou, obviously, have taken this case seriously, and I'm sure that's true." Examining the instructions in their entirety, we reject defendant's claim that the trial court's remarks about the jurors enjoying the evening detracted from the gravity of the manner in which they were to treat the case. Although the court's remarks represent a departure from the standard jury instruction, they are not unduly coercive. Because there was no substantial departure from the standard jury instruction, defendant has not demonstrated a plain error warranting reversal. *Carines, supra* at 763.

Finally, defendant seeks resentencing on the ground that the trial court erroneously scored 15 points for offense variable (OV) 8, MCL 777.38, of the sentencing guidelines. In general, we review de novo questions of law involving the interpretation of the sentencing guidelines, but will uphold a sentencing court's scoring decision if there is any evidence to support it. *People v Endres,* 269 Mich App 414, 417; 711 NW2d 398 (2006). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under MCL 777.38(1)(a), 15 points may be scored for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." The basis for defendant's objection to the scoring of OV 8 at sentencing was that the victim was only moved from one room to another inside the home. The trial court found that the victim's testimony that defendant moved her from the living room to the bedroom was sufficient to support the score of 15 points. Considering that the victim's testimony established that she was not only moved to another place in the house, but was also removed from the presence of the child, we conclude that the evidence was sufficient to support the trial court's scoring decision. It was reasonable to infer that the presence of the child affected defendant's willingness to engage in sexually assaultive activity toward the victim, and that by moving the victim to the bedroom, outside the presence of the child, the victim was transported to another place of greater danger. Cf. *People v Spanke*, 254 Mich App 642, 646-648; 658 NW2d 504 (2003) (15 points proper where victims were secreted from observation of others). Therefore, we uphold the trial court's scoring decision.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto